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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 650

FRED FREDERICKS,

Petitioner,

against

AMERICAN EXPORT LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

Fred Fredericks,

Petitioner,

against

American Export Lines, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Fred Fredericks, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Court Below

The opinion of Hon. David N. Edelstein, U.S.D.J., is printed in the Appendix submitted herewith (pp. 250a-255a)* and is unreported.

The opinion of the Circuit Court of Appeals for the Second Circuit by Hon. Harold R. Medina, Circuit Judge, is printed in the Appendix hereto (Petition, p. 16) and has not yet been officially reported.

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit Court sought to be reviewed was decided and entered on November 7, 1955.

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*All references, unless otherwise indicated, are to pages of the Joint Appendix upon which the Appeal was argued in the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254 (1).

Questions Presented

1. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in the cases of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, and *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, by refusing to submit to the jury the questions of fact involved and passing upon them as a matter of law although the great weight of evidence was in favor of plaintiff's contention.

2. Whether the Court of Appeals in affirming the judgment of the Court below erroneously approved the action of the Court below in refusing to apply the provisions of the Labor Law of the State of New York (§§ 200 and 2) as the measure of care required of the respondent to the petitioner, a business visitor at defendant's pier.

3. Whether the Court of Appeals in affirming the judgment of the Court below erroneously deviated from the principles of law established by this Court in *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, Aff. 205 F. 2d 478, and *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 63 S. Ct. 488, in refusing to hold that the respondent which was engaged in transferring cargo from one of its vessels to its pier adopted gear supplied by its stevedoring contractor and became liable for injuries sustained by an employee of the stevedoring contractor because of defective gear.

4. Whether the Court of Appeals in affirming the judgment of the Court below erroneously held that the degree of care required of the operator of the pier engaged in the discharge of cargo from its ship to the pier, is governed by local law rather than by the maritime law.

Statutes Involved

Labor Law of the State of New York, Laws of 1921—Chapter 50.

Sec. 200

"General Duty to Protect Health and Safety of Employees

All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section."

Sec. 2—**Definitions**—whenever used in this chapter • • • Subdivision 13:

" 'Public building' shall include a factory building, an office building, a mercantile building, a hotel building, a theatre building, a warehouse building, an apartment building, a state or municipal building, a school, a college or university building, a building containing a place of public assembly maintained or leased for pecuniary gain, or any other building more than one story high except a dwelling house less than three stories high or occupied by less than three families."

Statement of the Case

This was an action at law brought in the United States District Court for the Southern District of New York. Jurisdiction of that Court was founded upon the diversity of citizenship between plaintiff and defendant.

The action was brought to recover damages for personal injuries sustained by the plaintiff, a longshoreman, who was in the employ of John W. McGrath Corp. (hereinafter

referred to as McGrath), which was under contract to perform general stevedoring services for the American Export Lines, Inc. (hereinafter referred to as American), the lessee in possession of the pier. On April 13, 1951, plaintiff was standing on a skid or platform on the upper level of pier 84, North River, assisting in the transfer of cargo from a ship alongside the pier to the upper story of the pier, when one of the metal supports of this platform failed, causing the platform to fall, precipitating the plaintiff and another worker who was on the platform at the time, to the level below, causing both to sustain serious personal injuries.

The cause of action of the plaintiff's fellow worker has not yet come to trial.

The pier in question is enclosed with walls on three sides and a roof on top. At the lower level a stringpiece extends out horizontally from the vertical walls, a distance of approximately 6 or 8 feet over the water (31a-33a). The upper level is not equipped with any such stringpiece (33a), except on the westerly end where a balcony extends beyond the wall a distance of about 20 feet (32a). When handling cargo, this stringpiece is necessary as a platform on which the men may stand and on which to place the cargo, since without the extension beyond the vertical wall, any weight hanging perpendicularly from the fall would be suspended over the water outside of the pier and would have no platform on which to be landed to be brought inside the pier and no place where the men could stand in order to receive the draft. To compensate for the lack of a stringpiece, good stevedoring practice dictates the use of a so-called "skid" (33a, 34a, 101a-103a) which is in effect a portable landing platform which is fitted to the floor of the upper level of the dock when in use and extends beyond the vertical wall, serving for the time being as a stringpiece.

The skid in question was constructed of heavy timbers placed side by side, re-enforced and bolted together and fitted with metal plates at either end and in the center, which plates are fabricated of ¾ inch structural steel (155a). These plates extend beyond the inner aspect of the skid and are set on the floor of the upper level of the pier and by means of wire cables attached to the outer corners of the skid and affixed to the top of the door; the skid remains in place while in use and has the appearance of the tailboard of a wagon when the same is dropped.

The plaintiff and his fellow worker were injured when one of these metal plates broke. The break was traced to defective bending of the metal plate by the defendant, S. J. Farrington Iron Works, Inc. (hereinafter referred to as Farrington), and it was established that the break occurred at the time of manufacture or soon thereafter (158a) and progressed until final failure (160a-161a) and could have been discovered by a reasonable inspection (181a).

Action was originally instituted against American and after it appeared that the steel which was used as part of the skid assembly was fabricated by Farrington, the latter was joined as a party defendant and the case proceeded to trial against both. At the close of plaintiff's case and on motion of counsel for the defendant, American, the complaint against American was dismissed by the Trial Court. The case was submitted to the jury as between plaintiff and Farrington, as the sole defendant, and resulted in a verdict in favor of plaintiff and against Farrington, in the sum of $38,750.00.

Thereafter, Farrington appealed from the judgment against it and plaintiff appealed from the judgment dismissing this complaint against American. The judgment in both instances was in all respects affirmed by the United States Court of Appeals for the Second Circuit, with an opinion per Medina, Circuit Judge, which is attached to this petition.

Reasons for Allowance of the Writ

I.

An important and serious question is presented in the instant case, one which is of vital concern both to the shipping industry and to labor in the industry. It was established in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, at page 97, that

> "It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or the stevedoring contractor should not determine the measure of his rights."

In *Pope & Talbott Inc.* v. *Hawn,* 346 U. S. 406, this Court in extending to all persons working aboard a vessel the rights afforded a seaman, said:

> "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness."

In the interim, this Court in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36, 63 S. Ct. 488, had extended to a seaman, a member of the ship's crew who was injured on land, by reason of the negligence of a fellow servant, the same rights which a seaman injured aboard the vessel had. The Court said at page 42:

> "The right of recovery in the Jones Act is given to the seaman as such, and, in the case of maintenance and cure, the Admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

Following this case, the United States Court of Appeals for the Second Circuit in *Strika* v. *Netherlands Ministry of Traffic*, 185 Fed. 2d 555, Cert. den. 341 U. S. 904, held that a longshoreman who was injured on land by reason of unseaworthiness of a ship's gear was entitled to recover against the ship's owner. The Court of Appeals, basing its decision on *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra*, reasoned that

> "Those decisions appear to us to settle it that such a tort, arising as it does not out of a maritime 'status' or 'relation' is cognizable by the Maritime Law whether it arises on sea or on land. For it seems to us to follow, if Congress has power to impose liability in favor of seamen for lapses of care on shore, that Congress at least would have power to impose a similar liability when the lapse is in furnishing a seaworthy ship."

The Court continues:

> "For these reasons, although we have been unable to find a decision holding that a seaman, injured ashore by unseaworthy ship's gear, can recover, we have no doubt that he could; and, if a seaman can, we see no reason to question the ability of a longshoreman also to recover, for that follows from the reasoning of *Seas Shipping Co.* v. *Sieracki, supra*, especially when it is read with the opinion in *Swenson* v. *Marra Bros. Inc.*, 328 U. S [illegible]"

Continuing in this evolution of the extension of the rights of those employees of third parties doing the work traditionally done by seamen, this Court in *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, affirming 205 Fed. 2d 478, on the decision of the Court below, held that where gear is supplied to be used aboard a vessel by a third party and one of the employees of that third party sus-

tains injury as a result of a defect in that equipment, the vessel owner is held to have adopted, so to speak, such gear and if that gear has the effect of making the vessel unseaworthy, the vessel owner is liable to the injured employee. This Court in the *Petterson* case, said:

> "It cannot be assumed that the Court meant that the stevedore should lose this protection merely because his immediate employer has temporarily assumed control of a portion of the ship without becoming the owner pro hac vice."

This Court went one step further in *Rogers* v. *United States Lines Co.*, 347 U. S. 984, reversing 205 Fed. 2d 57, wherein this Court in following the *Petterson* case, *supra*, held that where a land fall was the defective gear involved in the accident which caused injury to a longshoreman on the vessel, the vessel owner is liable to the longshoreman. This Court, reversing the Court of Appeals approved plaintiff's contention which had been rejected by the Court of Appeals:

> "He claims that although the runner 'was originally provided by the stevedoring contractor, it was adopted by the vessel and incorporated with the ship's loading equipment and thus became an appurtenance of the vessel, with regard to which the ship had a continuing and non-delegable responsibility for its seaworthiness'." *Rogers* v. *U. S. Lines*, 205 Fed. 2d 57.

Thus, in the *Rogers* case, an appliance on the landward side was the cause of the injury but this Court held that the vessel owner continued to be responsible for the safety of the longshoreman, even though the appliance was furnished by the longshoreman's employer who was not the vessel owner.

In the instant case, the decision of the Court of Appeals in affirming the Court below, would appear to be a holding

in derogation of the principles enunciated by this Court in the cases just cited. The decision of the Court of Appeals in this case would deny recovery to the longshoreman merely because the skid was attached on one side only and on that side it was attached to the land. Surely, if the skid were a few feet wider and were attached to the ship alone or to both ship and land, the decisions of this Court in *Sieracki, O'Donnell, Petterson* and *Rogers, supra,* would compel a finding in favor of the longshoreman. We are then constrained to pose this question:

Does the fortuitous circumstance that the skid was a few feet short of the vessel protect the shipowner from responsibility?

It is submitted that if this conclusion be reached it would destroy to a great extent the rights which this Court has said inure to those who do the work traditionally done by seamen but who because of the complications of modern finance and industry, are employed by others than the vessel owner but continue to do the work done by seamen. It would serve to destroy what this Court was pleased to term in the *Sieracki* case, *supra*

> "A form of absolute duty owing to all within the range of its humanitarian policy."

It would destroy further the policy stated by this Court in the *Sieracki* case, at page 91

> "It would hardly seem consistent with the obligations benevolent purposes that the owner might nullify it by the device of having all the men on the ship hired by others willing to furnish men for such service or sea or *ashore.*" (Emphasis ours.)

It is submitted that the petitioner in this case while not a seaman in the sense that he was not a member of the crew and while not performing his service aboard the

ship, nevertheless had a "maritime" status. He was performing work which partakes of a maritime contract. He was discharging the obligation of American, in part, of delivering goods by sea. It is further submitted that the skid which was being used to discharge cargo from the vessel could operate, in effect, to make the vessel unseaworthy to the same extent as though it were actually attached to the vessel.

On the other hand, reasoning does not have to be drawn to such a fine line to find responsibility on the part of American. It might be abhorrent to maritime lawyers to think of a device attached to land as one which could cause a vessel to become unseaworthy, but the traditional obligation of furnishing a safe place to work partakes of the same character as the warranty of seaworthiness and is equally non-delegable and continuous.

The general rule throughout the United States as expressed in the American Institute Re-Statement of the Law of Torts, Vol. 2, Chap. 13, Sec. 344, holds that a possessor of land is required to exercise reasonably careful supervision of the appliances supplied by an independent contractor and becomes liable for injury if he fails to subject the appliances used to reasonable inspection.

In dealing with the loading and discharge of cargo from vessels, as above stated, we are dealing with something cognizable by the Maritime Law rather than by local law. It is a field where, because of the nature of the work involved, uniformity of rule is more desirable than local variation. It is submitted that it is a field where maritime law rather than local law should apply and where uniform responsibility should exist throughout the several states.

II.

The decision of the Court of Appeals which sustained the Court below in dismissing plaintiff's complaint and

refusing to permit the jury to pass upon the questions of fact involved is in conflict with the principle of law enunciated by this Court in *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Plaintiff posed several alternative theories of liability upon any one of which American would be liable to this plaintiff for the injuries sustained.

One of the theories was based upon the failure of American to comply with Section 200 of the Labor Law of the State of New York (Laws of 1921, Chap. 50), which requires the operator of a pier (Labor Law, Sec. 2, subdiv. 13) to provide "reasonable and adequate protection for the lives, health and safety of all persons employed therein".

The testimony overwhelmingly supported the contention that the upper level of the pier was unusable for cargo operations, or certainly not usable with safety for cargo operations (33a, 34a, 101a-103a, 114a, 115a) without a stringpiece or a skid such as that here involved. Plaintiff argued in accordance with the rule of law enunciated in *Wiley* v. *Solvay Process Co.*, 215 N. Y. 591, that

> "A plant is defective when any part of it is not in a proper condition for the purpose for which it is intended and it is also *defective when it is so incomplete that the use of the plant is dangerous by reason of the failure to furnish reasonably necessary parts for the purpose for which it is used.*" (Emphasis ours.)

There was thus presented an issue of fact, at least, as to whether or not the skid which failed was a part of American's plant. This question should have been submitted to the jury as a question of fact. However, the Court took this question from the jury and dismissed the complaint at the close of plaintiff's case.

Judge Medina in the decision affirming the Court below commented:

> "To prove this plaintiff devoted considerable effort at the trial to eliciting testimony that cargo could not be safely transferred from aboard ship to the upper story of the pier without the use of a skid. There was some testimony to the contrary."

In removing consideration of this question from the jury, it is submitted that the Court of Appeals in sustaining the Court below which dismissed the complaint, was at variance with the rule enunciated by this Court in *Lavender* v. *Kurn, supra,* where the Court said:

> "Wherever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached, does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. * * * it being immaterial that the Court might draw a contrary inference for fear that another conclusion is more reasonable."

Again in *Wilkerson* v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413, this Court in an opinion per Mr. Justice Black, commented:

> "Moreover the Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: 'We see no reason, so long as a jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact,

why it should not decide such questions as these as well as others'. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences'."

In the same case (*Wilkerson* v. *McCarthy, supra*), Mr. Justice Douglas in a concurring opinion said in part:

"The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been respected.

"The historic role of the jury in performing that function, see *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 1050, 34 L. Ed. 235; *Bailey* v. *Central Vermont Ry., supra*, is being restored in this important class of cases."

A review of the evidence and authorities establishes that the jury would have been justified in finding that the skid in question was an integral part of the pier, that cargo operations could not be carried on without its use and that the plant of the employer, the defendant, American, was incomplete without the use of the particular skid.

The issue should thus have been left to the jury to determine as a matter of fact whether or not the plant was complete, and appropriate instructions given to the jury under the laws and decisions of the State of New York, which would have enabled them under proper circumstances to return a verdict for the plaintiff.

The Court below apparently fell into error in believing that the line of cases represented in the State of New York by *Boroshowsky* v. *Altman*, 280 App. Div. 599, and *Hess* v. *Bernheimer*, 219 N. Y. 415, precluded plaintiff's recovery under the circumstances. They neglected, however, to distinguish between the principle of those cases and the instant case. In those cases the structure or plant was not being used for its ultimate purpose and the particular appliance which failed did not supplement the ultimate purpose of the structure. That is, in the *Boroshowsky* case, a window cleaner was standing on a marquee cleaning windows—the marquee was not meant for that purpose and the purpose of the structure was not for cleaning windows.

In *Hess* v. *Bernheimer*, the defective appliance was one brought in for the purpose of cleaning vats. The purpose of the structure was the brewing of beer. In the instant case, on the other hand, the very purpose of the structure was the loading and discharge of vessels for which it was being used at the time of the injury.

III.

It is respectfully submitted that the Court of Appeals deviated also from the principle of law in the *Lavender* v. *Kurn* and *Wilkerson* v. *McCarthy* cases, *supra*, in affirming the lower Court's refusal to submit to the jury the question of fact as to whether the work in question was such as to be inherently dangerous.

It is respectfully submitted that where the work contracted for partakes of the contract of stevedoring work, the jury might well find that the defendant, American, has set in operation work which was inherently dangerous and would render the premises dangerous.

The Court of Appeals of the State of New York in *Wright* v. *Tudor City Twelfth Unit Inc.*, 276 N. Y. 303,

reversing 251 App. Div. 297, has held that this question is one of fact. The Court there said:

> "Were the dangers inherent in the work contracted for and should be reasonably anticipated is a question dependent upon the facts of each case."

Following this rule, the New York State Court in *Petluck* v. *McGoldrick Realty Co.*, 240 App. Div. 61, said:

> "Under this rule the employment of an independent contractor to do work likely to render the premises dangerous to invitees does not relieve the owner from his duty to see that due care is used to protect such persons."

It is submitted that the plaintiff has been deprived of a substantial right by the failure of the trial Court to submit this question of fact.

CONCLUSION

For the above reasons, a writ of certiorari should be granted as prayed for.

Respectfully submitted,

CHESTER A. HAHN,
Counsel for Petitioner.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 10—October Term, 1955.

(Argued October 4, 1955 Decided November 7, 1955.)

Docket No. 23077

FRED FREDERICKS,

Plaintiff-Appellee-Appellant,

—against—

AMERICAN EXPORT LINES, INC.,

Defendant-Appellee,

—and—

S. J. FARRINGTON IRON WORKS, INC.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—against—

JOHN W. MCGRATH CORPORATION,

Third-Party Defendant-Appellee.

Before:

CLARK, *Chief Judge*, and
MEDINA and LUMBARD, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York. David N. Edelstein, *Judge.*

Opinion.

Defendant S. J. Farrington Iron Works, Inc. appeals from a judgment in favor of plaintiff entered on the verdict of a jury, and plaintiff appeals from a judgment dismissing his complaint against American Export Lines, Inc. Affirmed.

SYLVIA MILLER, New York City (Chester A. Hahn, New York City, of Counsel), *for plaintiff-appellee-appellant.*

JOHN J. KIRWAN, New York City (Leo F. Hanan and Martin J. McHugh, New York City, of Counsel), *for defendant-appellee.*

HURLEY, KEARNEY, LANE & MATTISON, Brooklyn, New York (Denis M. Hurley, George P. Lane and William C. Mattison, Brooklyn, New York, of Counsel), *for defendant-appellant S. J. Farrington Iron Works, Inc.*

MEDINA, *Circuit Judge*:

Plaintiff was employed as a longshoreman on Pier 84, New York City, by the John W. McGrath Corporation (McGrath), which was under contract to perform general stevedoring services for the American Export Lines, Inc. (American), the lessee in possession of the pier. On April 13, 1951, plaintiff was standing on a skid or platform, assisting in the transfer of cargo from a ship to the upper story of the pier, when one of the iron supports on the skid broke, the skid gave way and plaintiff was precipitated to the stringpiece of the pier below. To recover damages for the serious injuries resulting from his fall, plain-

tiff brought this action, invoking the diversity jurisdiction of the District Court, against American and the S. J. Farrington Iron Works, Inc. (Farrington). Plaintiff appeals from the trial court's dismissal, at the end of his case, of the complaint against American; defendant Farrington appeals from the judgment entered on the jury's verdict for the plaintiff against Farrington.

Farrington's Appeal

The skid was the property of McGrath and was one of a type designed by a McGrath employee along lines suggested by skids used by another stevedore. It consisted of wooden planks, reinforced and bolted onto a bed of three iron plates, one at either end, and one in the center, each of which was six inches wide and three-fourths of an inch thick. Laterally, on one side all three irons made two right angle turns. The first turn was around the plank, marking one end of the bed; and the second turn was away from, but level with the planks, forming metal extensions, which fitted into and rested unfastened on the upper floor of the pier when the skid was in use. On the other side, the center plate terminated with the planking of the skid. The two end plates bent up at right angles to form pad eyes. When a loft skid is in use, two wire cables, one hooked into each pad eye, and suspended from the uprights of the pier, on either side of the doorway or opening, provide support for the skid. Loss of part of this support, when a pad eye broke off from the rest of the skid iron, was the immediate cause of the accident.

The applicable law is that of New York, and in instructing the jury the Court correctly, it is conceded, relied on that line of cases beginning with *McPherson* v. *Buick*, 217 N. Y. 382. The substance of the charge was that the jury was to return a verdict for the plaintiff if they found, first, that a defectively fabricated skid iron was to Farrington's

knowledge reasonably certain to place life and limb in peril, second, that the broken skid iron had in fact been negligently fabricated by Farrington, and, third, that Farrington's negligence was a proximate cause of plaintiff's injury.

The broken skid iron was one of some seventy-five irons fabricated by Farrington on orders placed by McGrath between 1945 and 1948. The break, in the expert opinion of one witness, might have started at the time of fabrication. In any event, it occurred because the concave surface of the right angle between bed and pad eye was formed over too small a radius creating a "stress raiser" or "localizer," an inherent weakness. This, the expert testified, had the effect of increasing indeterminably the stress put on the metal by any given load so that the metal would start to fail under a small load. From this evidence the jury could have found negligence and proximate cause. There was also evidence from which the jury could have deduced that Farrington had knowledge of the purpose to which the iron was to be put and hence of the danger to which human life would be exposed if the iron proved defective.

Farrington bases its first argument on the language of Judge Cardozo in *MacPherson* v. *Buick*. "The principle that the danger must be imminent does not change," which appears at page 291 of 217 N. Y., is interpreted by the defendant as a holding intended to limit the liability of the manufacturer in terms of the period of time intervening between cause and effect. *MacPherson* v. *Buick*, however, does not so hold, and immediacy in point of time is not an indispensable element of the New York rule. A bomb is nonetheless deadly if it contains a time mechanism. On the other hand, evidence of the passage of time, together with that of other attendant circumstances, is admissible, in order that a jury may not be led astray. The mere passage

of time confers no immunity upon a negligent wrongdoer; but it has relevance to the likelihood, depending upon the circumstances of a particular case, that deterioration due to use, perhaps accelerated by misuse, will be mistaken by a jury for a defect due to negligent manufacture or fabrication. On the evidence before us in this case, we cannot say the jury went beyond permissible and rational inference in attributing the accident to Farrington's negligent fabrication of the skid iron, which cracked and came apart, despite at least two and one-half years of apparently safe use and normally rough handling. *Davis* v. *Long Island R.R.*, 301 N. Y. 450, 453, 95 N. E. 2d 700; *Newhall* v. *McCann*, 267 N. Y. 394, 398, 196 N. E. 302; *Hayes* v. *Thompson*, 2 Hun 518 (Sup. Ct. 1874).

A brief discussion of another ground for reversal urged by Farrington will serve to bring into focus what seems to have been one of Farrington's principal contentions at the trial, the particulars of which will be referred to shortly.

The jury retired for their deliberations at 12:42 P. M. and at 3:45 P. M. requested further instructions, which were given. At 5:40 P. M. the forelady sent a message to the effect that the jury were unable to agree, but the trial judge requested them to make a further attempt to arrive at a verdict. Thereupon the jury requested that certain exhibits be brought to the juryroom and about fifteen minutes later, at 6:15 P. M., the trial judge, of his own motion and without further request from the jury or anyone else, recalled the jury and proceeded further to clarify "some portions" of his charge. He said:

> The Court: Ladies and gentlemen, I have been troubled that some portions of my charge might not have been as clear as they could have been, so I have attempted to rephrase, in the hope that clarification will be served.

The issues for your consideration are actually few and relatively simple, and you may not consider any other issues than the ones I submit for your consideration. You can't speculate. The Court frames the issues, and those are the issues you will concern yourselves with.

This introductory statement was followed by a paraphrase of what had already been said in the main charge on the subject of what the law required to be shown by way of knowledge by Farrington of the use which the skid iron "would be put to," in order to charge Farrington with a duty toward plaintiff, followed by a few words to assist the jury in reaching a conclusion on the subject of negligent fabrication.

It is claimed that it was error to emphasize these matters and that the effect of such supplemental instructions was to eliminate the issue of proximate cause as one of the essential elements of plaintiff's case.

The notion that a trial judge lacks power *suo motu* to recall a jury for further instructions when he thinks they are needed is indeed a startling proposition, reminiscent of the days of Jacksonian democracy, when local judges in many states were shorn of some of their traditional and necessary common law powers. Fortunately, no such shackles were put upon the federal judiciary. The trial judge had undoubted power to do what he did here. *Allis* v. *United States*, 155 U. S. 117; *Charlton* v. *Kelly*, 9 Cir., 156 Fed. 433.

Moreover, we are confident that neither the trial judge nor the jury thought that any of the issues submitted in the main charge were being taken from the jury.

Defendant Farrington, however, insists in its brief and on oral argument that there was intervening negligence by McGrath and that the case against Farrington should have

been dismissed or that the jury should have been instructed that, if they found such intervening negligence by McGrath, they should return a verdict in Farrington's favor.

While certain requests for instructions relative to the duty of McGrath to inspect the skid iron would seem to have been properly denied on technical grounds, we will assume that the point is properly raised by the objection noted just after the supplemental instructions above referred to were given. At that time counsel for Farrington asserted that these instructions were erroneous in that they "eliminated from the case any consideration * * * by the jury of any intervening act of negligence, whether on the part of John W. McGrath Corporation or anyone else."

Plaintiff's expert witness testified that the crack in the skid iron, at the place where it sheared off or broke at the time of the accident, was a progressive crack and must have had its inception a considerable time before the final and complete severance. He also testified that the crack should have been visible to the naked eye from the side, though not across the surface of the metal on the inside of the right-angled bend. There was evidence that McGrath subjected all its equipment to monthly inspection, but the crack was not observed, or reported.

It is elementary that the concurrent negligence of some third person will not absolve a defendant upon whom liability is sought to be imposed for the consequences of his own delict. Could the jury here, on the evidence before it, have properly found that the flow of causation, arising from the negligent fabrication of the skid iron by Farrington, was broken by McGrath's failure to discover the defect?

The point is not new, and many New York cases, decided after *MacPherson* v. *Buick*, have held that the negligent manufacturer of an article which is dangerous to life and limb when put to the use for which it was intended, may be liable, even though the negligence would have been with-

out harmful effect had an intervening purchaser diligently performed his duty to inspect. *Rosebrock* v. *General Electric,* 236 N. Y. 227, 140 N. E. 571; see *Sider* v. *General Electric,* 203 App. Div. 443, 197 N. Y. Supp. 98 (4th Dept. 1922), aff'd, 238 N. Y. 64, 143 N. E. 792; see *Smith* v. *Peerless,* 259 N. Y. 292, 181 N. E. 576. Legal scholars who have considered the question endorse the policy of these cases. See 2 Restatement, Torts Sec. 396 (Supp. 1948); Prosser, Torts §84, at p. 504 (2d ed. 1955); Bohlen, Liability of Manufacturers, 45 Law Quarterly Rev. 343 (1929).

That the intervening purchaser will remain passive or otherwise fail to do what he ought to do to prevent the course of events, is a reasonably foreseeable consequence of the original wrongdoing. Moreover, this is not a distinction based upon mere passivity but rather upon whether or not the ultimate fact or occurrence is reasonably foreseeable. This is a far cry from the doing of something or the refraining from doing something constituting an improbable, independent, intervening cause, which is a superseding cause and breaks the sequence. *Perry* v. *Rochester Lime Co.,* 219 N. Y. 60, 113 N. E. 529; *Ford Motor Co.* v. *Wagoner,* 183 Tenn. 392, 192 S. W. 2d 840 (1946); Prosser, Torts §49 (1941).

Plaintiff's Appeal Against American

Plaintiff's appeal must also fail, because his entire reasoning rests upon the untenable premise that the skid was part of American's plant or premises. To prove this plaintiff devoted considerable effort at the trial to eliciting testimony that cargo could not be safely transferred from aboard ship to the upper story of the pier without the use of a skid. There was some testimony to the contrary. But tools or equipment do not become part of a lessee's plant merely because such tools or equipment are indispensable to the work that an independent contractor has agreed to

perform. See *e.g.*, *Broderick* v. *Cauldwell-Wingate Co.*, 301 N. Y. 182, 93 N. E. 2d 629; *Iacano* v. *Frank & Frank Contracting Co.*, 259 N. Y. 377, 182 N. E. 23; *Hess* v. *Bernheimer*, 219 N. Y. 415, 114 N. E. 808. In fact the skid was no more essential to the performance of stevedoring services than the other equipment used by McGrath, such as ropes, pulleys and miscellaneous carrying and moving facilities. Nor is there any dispute about the fact that McGrath was at all times the owner and in exclusive possession and control of the skid.

In view of the foregoing, it requires no extended argument to demonstrate that Sections 13(2) and 200 of the New York Labor Law can be of no avail to plaintiff.

Finally, while in recent years the warranty of seaworthiness has been held by the Supreme Court to recover a pretty wide territory, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396; *Rogers* v. *United States Lines*, 347 U. S. 984, nevertheless, here the injury was incurred by a longshoreman standing on a pier, as a result of the failure of a defective appliance located on the pier and furnished by a subcontractor. No decision so far has extended the sweeping protection of the seaworthiness doctrine to this situation. No vessel was connected with the accident.

The judgments are affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

FRED FREDERICKS,
Petitioner,
against
AMERICAN EXPORT LINES, INC.,
Respondent.
No. 650

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below.

The opinion of the District Court is printed in the Appendix (250-255)* and is unreported.

The opinion of the Court of Appeals is reported at 227 F. 2d 450.

Jurisdiction.

The jurisdictional requisites are set forth in the petition.

Questions Presented.

The petition presents two questions based upon alternative theories of law:

1. Does maritime law apply and if so does a shipowner owe a warranty of seaworthiness with respect to an ap-

* Numerals in parentheses refer to pages in the Joint Appendix upon which the case was argued in the Court below unless otherwise indicated.

pliance located on a dock in the State of New York and not connected in any way with a vessel.

2. Does New York law apply and if so was a question of fact involved which the Court below refused to submit to a jury.

Statement.

The petitioner was injured on April 13, 1951, while employed on Pier 84, North River in the City of New York and while engaged in longshore work. The injury occurred when a skid used on the upper level of the pier, and not in any way connected with the vessel, which at that time was lying alongside the pier, collapsed causing the petitioner to fall to a lower level of the pier. The petitioner brought suit in the District Court against American Export Lines, Inc., the respondent here (hereinafter called American) and S. J. Farrington Iron Works, Inc., fabricator of the metal bands which supported the skid. Jurisdiction was founded upon diversity of citizenship between the parties. At the close of the plaintiff's case, and on motion of counsel for American, the complaint was dismissed as against it. The case was then submitted to the jury on the issues between the petitioner and S. J. Farrington Iron Works, Inc. Petitioner recovered a verdict in the sum of $38,750. Counsel for petitioner made no motion to set aside the verdict on grounds of inadequacy, but instead, accepted the verdict, apparently being content therewith. Thereafter, S. J. Farrington Iron Works, Inc., the fabricator of the metal, appealed from the judgment against it and petitioner appealed from the judgment dismissing his complaint against American. The judgments were unanimously affirmed by the Court of Appeals.

On April 13, 1951, the date of petitioner's accident, American pursuant to a contract with the City of New York, was lessee in possession of Pier 84, North River.

There is nothing in the lease to indicate that the City of New York conveyed to American anything other than the physical pier itself. John W. McGrath Corporation entered into a contract with American whereby McGrath agreed to perform stevedoring services for account of American at Pier 84. McGrath was in the general stevedoring business and performed stevedoring services at various piers of the City of New York for persons other than American. Prior to the time McGrath began to render stevedoring services to American, an employee of McGrath conceived the idea of employing skids in handling cargoes at the various piers and actually designed such a skid, using as a basis a facsimile skidiron which was obtained from Moore-McCormack Steamship Company (108, 124, 141). It is clear, therefore, that the particular skid and similar skids were not merely designed for Pier 84 but for use in McGrath's general business at whatever piers it was engaged. The skid which collapsed and caused petitioner to fall was owned by McGrath. It was assembled in McGrath's shop in New Jersey (133), using metal bands fabricated by S. J. Farrington Iron Works, Inc. at the specific order and request of McGrath (108). The skid and similar skids were capable of being transported from pier to pier and were transported and used by McGrath at piers at which it was conducting stevedoring activities (110). The skid was never permanently attached to any pier. It was rigged before loading operations began and removed when they were concluded (82). It would be removed at the end of each day even if the operations were not concluded (82). The skid in question and similar ones used by McGrath were always in possession and control of McGrath whose employees rigged and removed them (78, 79). McGrath had a regular monthly system of inspection of the skids and for the maintenance and repair of the skids (129, 135-136). It was conceded upon the trial that the skid or skids were never in the possession and control of American (187).

The use or non-use of the skid was not concerned with the safety of longshoremen (116). The use of the skid was to provide a more efficient and speedier means of handling cargo (118). The skid was not necessary to transfer cargo from a ship to the upper level of Pier 84 (34, 104, 149). The skid was not in any way attached to or part of American's vessel.

ARGUMENT

I.

The Court below properly refused to apply maritime law.

The Court of Appeals based its decision on New York law. This was because the accident occurred on land within the State of New York and no maritime instrumentality was involved. *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134, cert. den. 341 U. S. 915.

In contending that the Court of Appeals decision warrants review, petitioner claims that the maritime law rather than local law should apply, and further contends that because the decision below applied local law, it is in conflict with the law announced by this Court in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 90 L. ed. 1099; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L. ed. 596; *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, 98 L. ed. 798; *Rogers* v. *United States Lines*, 347 U. S. 984, 98 L. ed. 1120 (Petition, pp. 8-10).

In effect, the petitioner asks this Court not only to apply maritime law to the facts involved here but to extend the warranty of seaworthiness to an appliance on the dock, an area which thus far this Court and Congress had refused to do.

A review of the development and application of the doctrine of seaworthiness will show the fallacy of petitioner's argument.

In *The Osceola*, 189 U. S. 158, 175, 47 L. ed. 760, 764, the doctrine was defined as follows:

> "That the vessel and her owner, are, both by English and American law, liable to an indemnity for injuries received by seamen *in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship.*" (Emphasis supplied.)

All doubts about the absolute nature of the warranty were laid aside in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 88 L. ed. 1561. In 1945 a longshoreman was held to be within the protection of the warranty. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 90 L. ed. 1099. The *Sieracki* decision was premised on the theory that longshoremen while aboard the ship render services that are traditionally performed by seamen and thus should have the same protection. It is important to an understanding of the application of the doctrine of unseaworthiness to note that Sieracki was injured in consequence of a defective shackle on the ship.

In *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 98 L. ed. 143, the warranty was held to cover a carpenter on the theory that at the time of his injury he, like the longshoreman in the *Sieracki* decision, was doing a seaman's traditional work on the vessel. Hawn's injury was sustained when he fell through an unguarded hatch aboard the ship.

Further consideration was given by this Court to the doctrine as affecting the rights of longshoremen in *Alaska S. S. Co., Inc.* v. *Petterson*, 347 U. S. 396, 98 L. ed. 798. There the Court held that a longshoreman who was employed by an independent contractor and who was injured aboard ship as a result of a defect in equipment brought aboard by his employer was entitled to recover against the shipowner under the warranty of seaworthiness. The decision did not represent an extension of the warranty to cover injury to persons on land through causes totally dis-

connected with the vessel, but rather was a rejection of the theory that the shipowner's control of the instrumentality aboard ship which caused injury was an essential element of the right of recovery. To state it differently, the Court was affirming its decision in *Mahnich* v. *Southern S. S. Co., supra,* that the warranty was absolute in nature and did not depend upon control of the particular part of the ship or appurtenance thereon that produced the damage.

On slightly different facts the control theory was again rejected in *Rogers* v. *United States Lines,* 437 U. S. 984, 98 L. ed. 1120, reversing 205 F. 2d 57. Rogers was an employee of a stevedoring contractor engaged to discharge a cargo of ore from a vessel. In the conduct of the work one of the ship's booms, a landfall belonging to a stevedoring contractor, two ship's winches, a ship's runner on one of the winches and a landfall runner furnished by the stevedoring contractor on the other were in use and all of which were attached to the ship. Rogers was struck and injured by a tub of ore which was being hoisted off the ship to railroad cars on the dock. It was agreed that the injury occurred by reason of some defect in the landfall runner. This Court in reversing the Third Circuit, held that Rogers was entitled to the warranty of seaworthiness on the theory that the landfall runner in the manner in which it was rigged constituted an appurtenance of the vessel.

The *Rogers* case lays down the same rule announced in *Alaska S. S. Co.* v. *Petterson, supra,* that control by the shipowner of the instrumentality which causes the injury is not essential in the application of the warranty of seaworthiness. The case does not hold that the shipowner owes a warranty of seaworthiness with respect to appliances and equipment which are not appurtenant to the vessel and which are totally disconnected with the vessel.

The *Petterson* and *Rogers* cases are in principle similar to the decision of the Second Circuit in *Strika* v. *Nether-*

lands Ministry of Traffic, 185 F. 2d 555. Strika, a longshoreman, was injured on shore. The injury was caused by a defective bridle which belonged to the ship and which was attached to the ship's falls, booms and winches. Control of the insufficient bridle was not discussed in the Court of Appeals' opinion, but it appears from the facts that the bridle was owned by the shipowner. The fact that the injury was done or consummated on land was held to be of no importance since the cause of the injury was the ship itself. This Court had allowed a seaman to recover under somewhat similar circumstances in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* 318 U. S. 36, 87 L. ed. 596. The *O'Donnell* and *Strika* cases actually stand for the rule that the warranty of seaworthiness follows the ship and her appurtenances and appliances to whatever point they may produce injury.

A review of the decisions above cited demonstrates that the doctrine of seaworthiness has always been confined to the ship. Conversely stated, there can be no unseaworthiness unless it refers to a ship. Common sense dictates that equipment such as blocks and falls brought aboard a ship and landfall runners attached to a ship are as much a part of her as her hull itself.

The rule announced in the *O'Donnell* and *Strika* cases that a defect in the ship's equipment which produces an injury ashore entitles the one injured to the protection of the warranty of seaworthiness, was in theory predicated upon the historical concepts of admiralty jurisdiction. It was argued in the *Strika* case that since the action was upon the warranty of seaworthiness, maritime law could have no jurisdiction of a breach of it occurring on land. Judge Learned Hand, writing for the majority, in rejecting this argument cited this Court's decision in *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra,* and Public Law 695 of June 19, 1948, 46 U. S. C. A. 740.

Congress enacted Public Law 695 to extend the admir-

alty and maritime jurisdiction ". . . to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water,* notwithstanding that such damage or injury be done or consummated on land." It is clear, therefore, that Congress by statute announced the same principle that this Court laid down by decision in the *O'Donnell* case, i.e., that the warranty of seaworthiness follows the ship and its appurtenances to whatever place a defect in them may produce injury.

That admiralty jurisdiction is a concomitant to the application of maritime law is seen both in the reasoning of this Court in the *O'Donnell* case and of Congress by the enactment of Public Law 695. The place of the injury is of no consequence but that the cause of the injury must be a ship, or its appurtenances, on navigable waters is essential.

Similarly, in the passage of the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 901, *et seq.*, Congress made clear the distinction between situations within the admiralty jurisdiction and those of a purely local concern. By its terms the Act limits its coverage to disability or death resulting from an injury occurring upon the navigable waters of the United States. Congress did not attempt to deprive an injured employee disabled on shore of any remedy afforded to him by local law.

The cause of the petitioner's injury was not a vessel upon navigable waters or an appurtenance or appliance upon any vessel on navigable waters, but was an instrumentality located on land, designed and constructed solely for land use and not in any way attached to or connected with a vessel. To extend the warranty of seaworthiness to such an instrumentality would be a renunciation of the principles long standing in this Court and of Congressional intent. The facts here are governed solely by local law and, consequently, there can be no conflict with any of the decisions cited by petitioner.

The jurisdictional limitation to the application of mari-

time law was recognized by the Court below and carefully maintained.

Judge MEDINA wrote (227 F. 2d 450 at 454):

> "Finally, while in recent years the warranty of seaworthiness has been held by the Supreme Court to cover a pretty wide territory, Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143; Alaska Steamship Co. v. Petterson, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798; Rogers v. United States Lines, 347 U. S. 984, 74 S. Ct. 849, 98 L. Ed. 1120, nevertheless, here the injury was incurred by a longshoreman standing on a pier, as a result of the failure of a defective appliance located on the pier and furnished by a subcontractor. No decision so far has extended the sweeping protection of the seaworthiness doctrine to this situation. *No vessel was connected with the accident.*" (Emphasis supplied.)

II.

The Court below correctly interpreted and applied local law.

The petitioner first urging that the Court below erred in failing to apply maritime law, argues, in the alternative, that New York law applies but the Court below incorrectly interpreted it (Petition, pp. 10-14).

The argument that the New York law was erroneously interpreted by the Court below is founded upon the proposition that there were involved in this case questions of fact which should have been submitted for determination to the jury. Petitioner contends that the failure to submit these questions of fact rendered the decision below in conflict with the law laid down by this Court in *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. ed. 916 and *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. ed. 497. Both of those cases

concerned injuries to railway workers seeking to recover under the Federal Employers' Liability Act, 45 U. S. C. A. 51. Federal law, therefore, was involved and not the law of any State.

The *Lavender* and *Wilkerson* cases are not in point because under the applicable local law the evidence in this case presented no fact issue for determination by a jury.

Petitioner contends that under the law of New York the first issue of fact present was whether or not the skid which failed and caused petitioner's injury was part of American's plant. It is the contention of petitioner that the jury might have found in the affirmative on this issue and thus Sec. 200 of the Labor Law of New York (Laws of 1921, Chap. 50) would be invoked and which requires the operator of a pier (Labor Law, Sec. 2, subdiv. 13) to provide protection for the safety of persons employed within the plant. The entire argument of petitioner in this respect must fail because under New York law the skid in question was not a part of American's plant and therefore the Labor Law can have no application.

A review of the applicable New York law will demonstrate the error in petitioner's argument. In order to recover under the New York law petitioner would have to establish actionable negligence. The complaint specifically alleged negligence on the part of American (11).

It is a familiar and basic principle that in order to establish negligence it must be shown that a duty owing was breached. In the absence of a legal duty there can be no action for negligence. In *Palsgraf* v. *Long Island R. R. Co.*, 248 N. Y. 339, at 341, Judge Cardozo pointed out that "negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right."

The first issue for determination, therefore, is whether under New York law American owed a duty which it breached. The facts in the case show beyond question that American owed petitioner no duty. The skid which failed

was concededly an appliance in the exclusive possession and control of petitioner's employer, John W. McGrath Corporation, not American. McGrath, an independent contractor, brought the skid to the pier to facilitate the performance of its contractual obligations with American. The New York law is well established that the hirer of an independent contractor is not liable for the negligence of the independent contractor which results in injury to the latter's employee. *Hess* v. *Bernheimer*, 219 N. Y. 415; *Moore* v. *Wills, Inc.*, 250 N. Y. 426; *Ahbol* v. *Harden Contracting Co.*, 265 N. Y. 564; *Kuhn* v. *City of New York*, 274 N. Y. 118; *Broderick* v. *Cauldwell-Wingate Co.*, 301 N. Y. 182.

In arguing that the skid was a part of American's plant, petitioner is attempting to fashion an escape from the impact of the general rule. The escape route is blocked by *Iacono* v. *Frank & Frank Contracting Co.*, 259 N. Y. 377. There an action was brought against the owner of a building and general contractor to recover damages for the death of an employee of a subcontractor. The employee was killed when he fell from a hod hoist or elevator upon which he was riding. The hoist originally was erected on behalf of the subcontractor in charge of concrete work. It extended from the basement of the building to the 25th floor. After the concrete subcontractor had finished its work the hoist was leased to the plastering subcontractor under an agreement providing that the entire control and operation of the hoist was with the plastering subcontractor. The New York Court of Appeals pointed out in its opinion that the building owner and general contractor had not caused the installation of the hoist or suplied it for the use of the subcontractors nor had they ever possessed, controlled or operated it. The Court said (*Per* KELLOGG, J.), 259 N. Y. 377, at 380-382:

> ". . . We know of no duty resting upon an owner or a general contractor to inspect the ma-

chinery and tools furnished by a subcontractor, which that contractor exclusively possesses and controls; nor of any duty, after an inspection disclosing defects, to make repair of a defective appliance. 'If the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance (*Huston* v. *Dobson*, 138 App. Div. 810; *Fuller* v. *Mulcahy & Gibson*, 164 App. Div. 829), but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency. They are no part of the employer's plant; failure to furnish them is not a defect in the employer's plant.' (Per POUND, *J.*, in *Hess* v. *Bernheimer & Schwartz Brewing Co.* (219 N. Y. 415, 418); *DeLee* v. *Pardy Construction Co.* (249 N. Y. 103); *Caspersen* v. *LaSala Bros.* (253 N. Y. 491); *Hooey* v. *Airport Construction Co.* (253 N. Y. 486); *Dudar* v. *Milef Realty Corp.* (258 N. Y. 415), relied upon by respondent, hold nothing to the contrary. They express the principle that an owner, acting as general contractor in the construction of a building, and exercising general control and superintendence, owes to the employees of a subcontractor the duty of exercising reasonable care to make safe the places of work provided by him, and the ways and approaches to such places. Here we have a case, where the duty of inspecting and keeping safe apparatus and machinery, supplied to laborers by subcontractors employing them, has been cast upon the superintending owner and general contractor. The imposition of such a burden finds justification neither in principle nor authority."

The opinion in the *Iacono* case makes it clear that American had no duty to furnish the skid. Obviously, therefore, in the absence of such duty, no liability can be visited upon American for any defect in the skid furnished by the independent contractor. Further, the opinion in the *Iacono* case shows that the Court of Appeals regarded the hod hoist not to be a part of the building owner's or

general contractor's plant as a matter of law. Petitioner argues that the skid in this case was essential to the performance of work upon the pier. This contention, although contradictory to the testimony (47-48, 102-104, 117, 119-121, 149) is unimportant for in the *Iacono* case it is clear that the hod hoist was certainly necessary for the performance of the work which the building owner and general contractor had delegated to the subcontractors. It can be readily seen that the necessity for the use of the hod hoist was unimportant as a factor in determining whether it was a part of the employer's plant.

The contention that the skid was necessary to the performance of the work is also contrary to the recognized authorities. See "American Ship Stowage" published U. S. Government Dept. of Commerce (1942) wherein it is stated (p. 9):

> "On some piers, even those constructed in recent years, large *string pieces* have been provided and these, combined with very narrow aprons, interfere with the cargo-handling operations because the slingloads have to be made up inside the shed. This makes it impossible to discharge directly to the deck of the terminal or to hoist the slingload vertically to clear the ship's rail. Instead, the load has to be swung into the shed by manpower, or in loading the slingload has to be held by the longshoremen while it is being hoisted, to keep it from striking the side of the ship. This extra work and care slows down the entire operation. * * *"
>
> "A landing platform for the second floor is advisable on *double deck* piers for the same reason that wide aprons are desirable on the first deck. Slingloads can be handled with less delay. * * *"

In *Hess* v. *Bernheimer*, 219 N. Y. 415, a case in which plaintiff's reliance was placed on Sec. 200 of the Labor Law, the Court of Appeals rejected the theory that an employer of an independent contractor is under a duty to furnish appliances for use by the independent contractor's servants. The Court said (219 N. Y. 415, at 418):

> ". . . While the employer must exercise reasonable care to have his own plant safe for the employees of the contractor, he does not stand in the shoes of the contractor and become liable for the latter's negligence. If the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance (*Huston* v. *Dobson*, 138 App. Div. 810; *Fuller* v. *Mulcahy & Gibson*, 164 App. Div. 829), but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency. They are no part of the employer's plant; failure to furnish them is not a defect in the employer's plant; *he is under no absolute duty to furnish them and the statute has no application.*" (Emphasis supplied.)

The same principle was enunciated by the New York Court of Appeals in *Kuhn* v. *City of New York*, 274 N. Y. 118. In that case plaintiff sought to recover damages for personal injuries against the City of New York. The City owned Rikers Island and employed various contractors for the construction of buildings on the Island. The general contractor was P. J. Carlin Construction Co. The Island was inaccessible except by boat. Carlin arranged with the owner of a ferryboat to furnish transportation to and from the Island. The plaintiff, an employee of a subcontractor, was injured when the boat exploded. The Court said (274 N. Y. 118, at 134):

> ". . . there was no duty on the part of Carlin to make any inspection or to make repairs of defective means in the exclusive possession and operation and under the control of Forsyth (owner of the ferryboat)."

In addition to showing no duty existing on the part of American to furnish the skid in question, *Iacono* v. *Frank & Frank Contracting Co.*, 259 N. Y. 377; *Hess* v. *Bernheimer*, 219 N. Y. 415, and *Kuhn* v. *City of New York*, 274

N. Y. 118, also show that control of the instrumentality causing the injury on the part of the person charged is essential before that person can be made to respond in damages. The conclusion is inescapable that in the absence of control over the skid, which is in fact the thing that caused petitioner's injury, American owed no duty to petitioner for the breach of which it can be held.

Since American had no duty to furnish the skid and since it is conceded by petitioner that the skid was not in the possession, custody or control of American, the argument that the skid was a part of American's plant is untenable.

If the skid is not a part of American's plant, then certainly Sections 2 (13) and 200 of the New York Labor Law can be of no avail to the petitioner. *Hess* v. *Bernheimer, supra,* demonstrates the inapplicability of the Labor Law. The Court said (219 N. Y. 415, at 418):

> ". . . It cannot be said, however, that the duty of the employer is by this provision of the Statute extended to supervision of the method of doing work by the contractor or that the employer thereby becomes responsible for the negligence of the contractor in failing to furnish proper appliances therefor."

Although inappropriately placed in the section of the petition dealing with error of the Court below in failing to apply maritime law, petitioner relies on American Institute Re-Statement of the Law of Torts, Vol. 2, Chap. 13, Sec. 344, in an effort to show that American had a duty of exercising supervision over the appliances of its independent contractor McGrath and is liable for failure to submit such appliances to reasonable inspection. Even if it be assumed that Sec. 344 has application to facts such as are present here the New York cases cited under this point demonstrate beyond question that the section is not representative of the New York Law. By its own language it is manifest that the section is not in point. It deals

with the liability of the owner of a public place to the members of the public. Obviously the section refers to those owning premises such as ball parks, amusement areas, fairgrounds and similar places which are held open to the general public as place of business. Petitioner herein admits that Pier 84 was not such a place. It is quite obvious that Pier 84 was not open to the general public and was not used as a place to transact business with the public.

Petitioner entered the pier, not as a member of the public, but rather as an employee of an independent contractor. Reasons of public policy, which might have dictated the necessity of a rule such as indicated by Sec. 344 in Restatement of Law of Torts, were not present in the case at bar. American allowed persons to enter the pier not as members of the public but as employees of an independent contractor.

Comment B shows this beyond doubt, when the term "his patrons" is used, and shows that the section refers to members of the public that come upon public premises and cannot mean employees of an independent contractor entering upon private property.

The second issue of fact which petitioner claims should have been given to the jury is whether there was inherent danger in the work which American assigned to petitioner's employer McGrath.

This contention, like the contention that the skid was a part of American's plant, is contrived in an attempt to spell out an exception to the general rule that an employer of an independent contractor is not liable for the latter's negligence. If, of course, the work assigned to the subcontractor was inherently dangerous, then the employer has cast upon him the duty of supervising the work and this duty is nondelegable.

The essence of petitioner's argument in this respect is that loading and discharging ships in New York Harbor is inherently dangerous and thus American should have super-

vised McGrath an expert in the conduct of the work. This sort of reasoning strains the most vivid imagination. If there was any danger, the facts in the case indicate beyond doubt that the dangers existed in the negligent conduct of the details of the work which American had no power nor duty to control or supervise.

The decision of the New York Court of Appeals in *Boylhart* v. *DiMarco & Reimann, Inc.*, 270 N. Y. 217, is indisputable authority against petitioner's argument. There the Court defined the distinction between inherently dangerous work and danger arising merely from negligence in performing the details of work which is collateral to the work and not to be reasonably anticipated. The Court points out (270 N. Y. 217, at 220):

> ". . . The distinction between the two things is that in the one case the danger has its origin in an act of negligence collateral to the work, which could not be foreseen and guarded against beforehand, while in the other the danger is inherent in the work contracted to be done and might reasonably be expected. (*Hyman* v. *Barrett*, 224 N. Y. 436, 439). If the contractor leaves a pickaxe in the road (*Penny* v. *Wimbledon Urban District Counsel* [1899] 2 Q. B. 72, 76), or negligently drops a stone from a bridge under construction over a highway (*Reedie* v. *L. & N. W. Ry. Co.*, 4 Ex. 244) or negligently fires a blast (*Herrington* v. *Village of Lansingburgh*, 110 N. Y. 145), or while making repairs to a house, casually dislodges a board (*Hyman* v. *Barrett, supra*), his employer is not liable. If, however, he makes an excavation (*Storrs* v. *City of Utica*, 17 N. Y. 104), or raises an embankment (*Deming* v. *Terminal Railway of Buffalo*, 169 N. Y. 1) in a highway and fails to guard it or give warning, or leaves an insecure pile of iron rails in a street (*Ramsey* v. *National Contracting Co.*, 49 App. Div. 11), his employer is liable. . . ."

That the type of work in which petitioner was involved was not inherently dangerous can be seen from the decision

in *Moore* v. *Wills, Inc.*, 270 N. Y. 426. There a plank fell to the street from a building in which remodeling work was being carried out. The Court said (250 N. Y. 426, at 428):

> "The verdict against the general contractor, Charles T. Wills, Inc. was based upon the ground that it had general supervision of the work and was negligent in not properly supervising the work as it progressed. We are of the opinion that there is no evidence which justified the submission of that question to the jury. It is not suggested that the plan was not safe and proper, or that the work was not being done in a lawful way. The work being done was not intrinsically dangerous or any more hazardous than the construction of any building on a busy street. No method of doing the work has been suggested which would make for greater safety. The negligence of the subcontractor occurred while it was acting independently of the general contractor, and the general contractor was not in any way connected with the negligent act."

Similarly in *Hess* v. *Bernheimer*, 219 N. Y. 415, plaintiff's intestate died as a result of inhaling fumes while varnishing in a brewer's vat. The deceased was employed by an independent contractor who had been engaged by the brewer. The Court in rejecting the theory of inherent danger in the work, said (219 N. Y. 415, at 419):

> "Lutz, the contractor, was bound by the contract to furnish all the instrumentalities by which the work was to be done except the varnish and certain electric heaters; there was no defect in the vat; it was not unsafe *qua* vat; the work contracted for was not necessarily dangerous; the danger arose from the method in which the work was done; the defect was in the contractor's outfit and not in the plant of the appellant. . . ."

Rigging a skid of the type in question was certainly not in itself dangerous to petitioner or the public. The

danger in the skid existed because there was a defect in fabrication of one of the metal bands that suported it. Further, there is nothing in the contract between American and McGrath to show that McGrath or American had the duty of rigging a skid at all. It was merely something that McGrath chose to do in order to make more efficient progress with its work. It is clear that American left the details of the work to McGrath. *Gallagher* v. *United States Lines Co.* (2 Cir.), 206 F. 2d 177, *cert. den.* 346 U. S. 897.

The decisions relied on by petitioner to establish that the work was inherently dangerous are easily distinguishable. *Wright* v. *Tudor City Twelfth Unit, Inc.*, 276 N. Y. 303, involved work on an extremely busy street in New York City, the nature of which danger was readily foreseeable, and *Petluck* v. *McGoldrick Realty Co.*, 240 App. Div. 61, 268 N. Y. S. 782, involved the use of dynamite.

Conclusion.

The evidence here presents a matter of purely local concern. The New York law was correctly interpreted and applied. There is, therefore, no important Federal question involved and no conflict of decision. The decision below as it affects American did not deprive petitioner of any right or remedy conferred by local law. He had a right, availed himself of his remedy and was granted a recovery. The petition therefore presents no question of importance either to petitioner or the public and should be denied.

Respectfully submitted,

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